APPENDIX A

Nisi Prius Opinion

SUPREME COURT

SUFFOLK COUNTY

PART III

Indictment #2224-78

THE PEOPLE OF THE STATE OF NEW YORK

against

RONALD JAMES KOLB, GLEN EDWARD WAGNER
and ROBERT WILLETTE,

Defendants.

September 5, 1979
Riverhead, New York

Before:

HON. THOMAS M. STARK, Judge.

Appearances:

HON. PATRICK HENRY,
District Attorney, Suffolk County

By: THOMAS SPOTA, ESQ.,
Assistant District Attorney

WILLIAM O'LEARY, ESQ.,
Attorney for Defendant Kolb
548 Roanoke Avenue
Riverhead, New York

Appendix A

BENEDICT VUTURO, ESQ.,
Attorney for Defendant Wagner
71 Smithtown Boulevard
Smithtown, New York

EDWARD THOMPSON, ESQ.,
Attorney for Defendant Willette
350 Vanderbilt Motor Parkway
Hauppauge, New York

Vincent J. Restivo,
Official Court Reporter.

Appendix A

The Clerk: People versus Ronald Kolb, Glen Wagner and Robert Willette.

Mr. O'Leary: William R. O'Leary, for the defendant, Ronald Kolb.

Mr. Vuturo: Benedict Vuturo, 71 Smithtown Boulevard, Smithtown, New York, for the Defendant Wagner.

Mr. Thompson: Edward Thompson, 350 Vanderbilt Motor Parkway, Hauppauge, New York, for the defendant, Robert Willette.

The Court: I believe the Clerk explained to you the reason for the delay this morning? The Sheriff has as yet been unable to deliver prisoners to this particular part.

One of the defendants is in custody.

I did not convene this proceeding until I was just given an indication that Mr. Kolb's attorney would be willing to waive his attendance at the proceedings this morning.

Mr. O'Leary,

Mr. O'Leary: That is so.

The Court: Are you fully willing to waive the personal attendance of your client at the proceedings this morning?

Mr. O'Leary: I will, your Honor.

The Court: All right.

Now, at this time gentlemen, I'm prepared to place upon the record a number of decisions relating to various motions made by various defendants concerning this pending trial.

You will all recall that at the conclusion of the hearings conducted back in the last week of the June term, that I reserved decisions on various motions which were pending before me at that time, and at this time I am prepared to read into the record decisions on each of the motions upon which I reserved decision.

Appendix A

First, I will render my decision on the various motions of each of the defendants to suppress evidence.

Each of the three defendants have moved pursuant to Article 710 of the Criminal Procedure Law to suppress or exclude certain evidence proposed to be offered against each of them upon the trial of this indictment. The Defendant Willette has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers and Assistant District Attorney reciting or describing oral and written statements allegedly made by him while in police custody on the night of September 12th-13th, 1978, on the ground that such statements, if made, were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Willette, in his affidavit in the motion papers, makes five specific claims of involuntariness:

(A) That he was taken into custody by the police unlawfully;

(B) That his purported waiver of assistance of counsel was obtained by the police in the absence of his attorneys;

(C) That he was denied access to his attorneys by the police and Assistant District Attorney Sullivan after demanding same;

(D) That during a seven-hour period of continuous interrogation he was physically and mentally abused by the police; and

(E) That he was induced to sign a written statement by certain promises and statements made to him by the police and by further promises made to him by Assistant District Attorney Sullivan.

Appendix A

The Defendant Kolb has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing oral statements allegedly made by him while in police custody on the night of September 13th-14th, 1978 on the ground that such statements, if made, were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Kolb has orally specified four claims regarding his alleged statements:

(A) That he never made any oral statements whatsoever;

(B) That he was never advised by any police of his Miranda Rights;

(C) That he was physically beaten by the police; and

(D) That he was mentally incompetent at the time of his interrogation by the police.

The Defendant Wagner has moved to suppress or exclude potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing oral and written statements allegedly made by him while in police custody in the early morning hours of September 14th, 1978, on the ground that such statements were involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. In particular, the Defendant Wagner claims in a supplement to his moving papers, that his statements were obtained by the police "coercively through beatings from the law enforcement officers," and that he was placed in fear of his personal safety.

Appendix A

The allegations of each defendant were denied by the People, and accordingly, a joint evidentiary hearing was conducted before me over a period of five days, to wit, June 18th, 19th, 20th, 21st and 22nd, 1979.

Ten witnesses testified upon the hearing, and 20 hearing exhibits were received into evidence.

The Defendant Willette subsequently submitted a Memorandum of Law in early August.

I have carefully reviewed and considered the hearing testimony of each of the ten witnesses and have given each witness's testimony such credit, belief and weight to which I find same to be entitled. I have also carefully reviewed and considered the contents of each hearing exhibit as such may bear upon the credibility of the testimony of the various witnesses.

The testimony of the various police witnesses, including Det. Rodriguez, Det. Warkenthien, Det. Tosi, Det./Sgt. Misegades and Det./Lt. Dunn, even though differing in minor details, was generally consistent, forthright and credible. There was no indication that their testimony was false or fabricated.

The testimony given by Assistant District Attorney Sullivan was forthright and credible and was consistent with the testimony of Officers Rodriguez, Misegades and Dunn, who were present in the same room when the defendant Willette and Assistant District Attorney Sullivan had a conversation.

There was no indication that Mr. Sullivan's testimony was false or fabricated.

The testimony given by Miss Candace Norton as to the material facts was not credible or worthy of belief. Her

testimony on behalf of the Defendant Willette was inconsistent with her own written statement and she exhibited obvious hostility against the prosecution, and, in addition, had a motive to falsify her testimony in light of her pending civil litigation against the police department.

The testimony given by the Defendant Willette as to the crucial or material facts, was diametrically different from that given by the police witnesses and Assistant District Attorney Sullivan.

Applying the customary tests of credibility to the defendant, Willette's testimony, I find his hearing testimony to be incredible and not worthy of belief.

After such a review and consideration on all of the hearing evidence, I do hereby find, as matters of fact, beyond a reasonable doubt, the following facts essential to the determination of the defendant's motions:

1. In early September, 1978, officers of the Suffolk County Police Department Homicide Squad were actively engaged in the investigation of persons suspected of having participated in the homicidal death of one, Thomas Henderson, which had occurred on or about March 13, 1975, in his home in Blue Point during the course of a burglary and/or robbery.

The three defendants, Kolb, Wagner and Willette, had become suspect by reason of one, Robert Gribbins, having told the police that he, Kolb, Wagner, Willette and another individual had participated together in the crimes. Gribbins agreed to cooperate with the police in the investigation and in their plan to obtain further evidence against his alleged accomplices.

Appendix A

2. On the evening of September 12, 1978, the police outfitted Gribbins with a hidden radio transmitter and gave him the use of an unmarked police car. Gribbins proceeded to the Modell Shopping Center in Centereach with his activities under police visual surveillance and any radio transmissions being monitored and recorded.

At approximately 8:00 p.m., the Defendant Willette and his girl friend, Candace Norton, arrived at the shopping center where they entered Gribbins' car, and a conversation with Gribbins in his car—and had a conversation with Gribbins in his car concerning the Henderson murder, during which conversation Willette made certain incriminatory remarks. This conversation was heard by the surveilling police over the radio. After the car had been driven about and returned to the shopping center, the police believed that the Defendant Willette had become suspicious about Gribbins' car, and it was decided that the Defendant Willette would be taken into custody immediately at the shopping center.

3. At approximately 9:30 p.m., the Defendant Willette was taken into custody at the shopping center by Dets. Zito and Rodriguez. The Defendant Willette was placed into a police vehicle and driven to Homicide Squad Headquarters at Yaphank by these two officers.

During this trip, the Defendant Willette was not interrogated in any manner regarding the crimes, and upon arrival at the Homicide Squad Headquarters the Defendant Willette was taken to and placed in Lt. Dunn's office where Det. Zito remained with him and was joined by Det. Palumbo.

Det. Rodriguez left the Defendant Willette's presence at this point to attend the interrogation of Candace Norton.

4. Candace Norton had been transported from the shopping center to the Homicide Squad Headquarters separately, and upon her arrival she was placed in a separate office where she was interrogated by Det. Tosi and Rodriguez as to her knowledge of the Henderson crimes and the possible involvement of Wagner and Willette.

She told the police about recent incriminatory conduct and statements of Willette and Wagner, which indicated their having participated in the Henderson crimes. Det. Tosi conveyed the information given orally by Miss Norton to other detectives and then prepared a written statement which Miss Norton read and signed (People's Hearing Exhibit #12.)

5. At approximately 11:00 p.m., Lt. Dunn. conducted a joint conference with Det./Sgt. Misegades and Dets. Tosi, Rodriguez and Warkenthien, and they discussed the information which had been provided by Miss Norton. A decision was made after this conference at approximately 11:30 p.m. to interrogate the Defendant Willette. Between the time of his arrival at Homicide Headquarters and 11:30 p.m., the Defendant Willette had been kept in the lieutenant's office in custody of Det. Zito, and during this period there was no interrogation of the Defendant Willette as to the Henderson crimes.

6. At approximately 11:30 p.m., Dets. Rodriguez and Warkenthien entered the lieutenant's office for the purpose

of interrogating the Defendant Willette. After approximately 15 minutes of general conversation, Rodriguez told the Defendant Willette that he had a problem, and at this point orally advised the Defendant Willette of his Miranda Rights. Such advice included his right to remain silent; that anything he did say can and will be used against him in court; his right to talk to a lawyer right now and have him present during interrogation; and his right to an appointed attorney if indigent.

The Defendant Willette stated that he understood his rights and that he didn't need a lawyer; that he hadn't done anything.

Defendant Willette, at this point, also made derogatory remarks regarding the attorney who was presently representing him on an unrelated Burglary/Robbery charge.

This unrelated charge concerned a burglary of a private home on May 3, 1978, and the forcible stealing of property from the occupant. The Defendant Willette and Robert Gribbins had been indicted for these crimes and the criminal action was then pending in the Supreme Court. Attorneys George Sandberg and William Weber were representing the Defendant Willette in this unrelated criminal action, and such fact was known to the Homicide Squad Officers at the time of the Defendant Willette's interrogation on September 12, 1978.

7. After the Defendant Willette waived his right to remain silent and his right to the presence of counsel, Det. Rodriguez commenced his interrogation by telling the Defendant Willette that Gribbins had implicated him in the Henderson crimes and Willette denied any participation.

Rodriguez then told Willette as to the statements of Candace Norton and that Gribbins had been working with the police and had been wired. The Defendant Willette said he didn't believe this. Rodriguez and Warkenthien then began to press Willette, who eventually admitted that he knew Kolb and Wagner and had some knowledge of what had happened at the Henderson home. Willette was then told further details of what the police had learned and at this point he cursed Gribbins and said that he, Willette, had been outside in the car when the crimes occurred.

Det. Rodriguez then asked Defendant Willette to tell him the entire story, and Willette then made a lengthy oral statement in which he admitted his participation with Gribbins, Kolb and Wagner in the events of March 13, 1975, prior to, during and after the commission of the crimes.

These oral statements were completed at approximately 2:00 a.m. on September 13, 1978.

8. Det. Rodriguez then brought up the subject of preparing a written statement, and the Defendant Willette agreed that this be done, but said that he wouldn't sign it. Rodriguez then began to write out, by hand, a written statement (People's Hearing Exhibit #1). As Rodriguez spoke to the Defendant Willette, and incorporated his answers into the written statement, Willette indicated that he would be interested in obtaining a deal, and that he would like to talk to a District Attorney as to this possibility. At this point, Det. Warkenthien left the room and conferred with Lt. Dunn as to Willette's request. At approximately 3:30 a.m., Lt. Dunn placed a telephone call to Assistant District Attorney Sullivan at home and requested him to come to Homicide Squad Headquarters.

Appendix A

In the meanwhile, Det. Rodriguez continued to write out the written statement as the Defendant Willette repeated his previous oral statements as to his participation in the crimes. The written statement was completed but not as yet signed by the Defendant Willette at the time Assistant District Attorney Sullivan arrived at Homicide Squad Headquarters at approximately 4:30 a.m.

9. Upon Assistant District Attorney Sullivan's arrival, he had a private conference with Lt. Dunn, Det./Sgt. Misegades and Dets. Rodriguez and Warkenthien, and was told about the Defendant Willette's oral incriminatory statements and other details as to the present status of the investigation, and that the Defendant Willette wanted to speak with him.

After approximately 15 minutes, Sullivan went to the lieutenant's office where the Defendant Willette was seated and began a conversation with him.

Also present in the office during the entire Sullivan-Willette conversation were Lt. Dunn, Det./Sgt. Misegades and Det. Rodriguez.

10. Sullivan introduced himself to Willette who said he recognized him from the courts in Riverhead. Sullivan then asked Willette how he had been treated by the police, and Willette responded that these guys had treated him okay. Sullivan then orally advised Willette of his Miranda Rights in great detail, and Willette told Sullivan that he understood his rights and acknowledged that the police had previously advised him of his rights before interrogation.

Sullivan next brought up the subject of Willette having a lawyer representing him already on the unrelated Bur-

glary/Robbery charges. Willette told Sullivan that he was dissatisfied with his present lawyer, and that he did not want to contact any lawyer at that time.

Willette told Sullivan that the police had made no promises to him during interrogation, except to tell him that his girl friend, Candace Norton, would not be charged with any crime. The Defendant Willette expressed his complete willingness to talk with Assistant District Attorney Sullivan about his participation in the Henderson crimes.

11. Mr. Sullivan then interrogated Defendant Willette at length as to the contents of the unsigned written statement. Willette told Sullivan that everything he had told the police, and that everything that was contained in the written statement was true and especially emphasized that he had remained in the car at the Henderson house while the others went inside.

The Defendant Willette told Sullivan that he wanted to cooperate with the police and help them to obtain evidence against the others, and asked Sullivan what consideration he would be given for his cooperation.

12. Assistant District Attorney Sullivan then told the defendant in considerable detail as to what the District Attorney would do and what the District Attorney would not do in return for the Defendant Willette's cooperation.

Mr. Sullivan told the Defendant Willette that everything would depend on whether or not he was telling the truth as to his limited participation in the crimes and upon the extent and helpfulness of his cooperation.

Mr. Sullivan told the Defendant Willette that he would be charged with a crime or crimes relating to the events of

March 13, 1975, but made no statement or promise to him as to the exact crime or crimes to be charged.

Mr. Sullivan told the Defendant Willette that he would not be granted immunity from prosecution under any circumstances. Mr. Sullivan specifically told the Defendant Willette that if he was telling them the truth, and that if his cooperation was helpful to the police and the District Attorney in the prosecution of the others, that under such circumstances the District Attorney would consent to the entry of a guilty plea and fully advise the sentencing judge as to the extent and helpfulness of his cooperation as part of any sentence recommendation.

Mr. Sullivan emphasized to the Defendant Willette that he was not making any promise to him as to what sentence he would receive upon a guilty plea, and specifically told Willette that he was not making any promise to him that he would not be sentenced to imprisonment. Sullivan and Willette then discussed whether he was going to sign the written statement, and Sullivan told Willette that this was entirely his choice or decision.

Det. Rodriguez then reviewed the contents of the written statement with the Defendant Willette and Assistant District Attorney Sullivan left the room at that point at approximately 5:15 a.m.

13. The Defendant Willette then read the written statement in the presence of Det. Rodriguez, initialled the corrections and insertions, initialled the rights portion and then signed the written statement at the bottom of each of the five pages. Det. Rodriguez signed as witnessed, and Det. Warkenthien signed as Notary. This occurred at approximately 5:30 a.m.

Appendix A

Assistant District Attorney Sullivan came back into the lieutenant's office at this point and had a brief conversation with Willette about his cooperating with the police in the further investigation of Kolb and Wagner. Sullivan then left the lieutenant's office and prepared handwritten notes as to his activities and conversations that morning (People's Hearing Exhibit #2.)

13-A. After signing the written statement, the Defendandt Willette and his girl friend, Candace Norton, voluntarily remained in police custody for the purpose of Willette's cooperation, the remainder of the day of September 13th, and were both housed in a motel overnight until the following day, September 14th. On the afternoon of September 14, 1978, the Defendant Willette was formally charged with the crimes and photographed (People's Hearing Exhibit #16B.)

The Defendant Willette was arraigned in the District Court of Suffolk County on the morning of September 15, 1978. At the time of his arraignment, his attorney, William Weber, told the District Court Judge of his client's claims as to having been beaten by the police and the Defendant Willette also made remarks in this regard and had a colloquy with the Judge (Defendant's Hearing Exhibit B.)

Upon the Defendant Willette's admission to the Suffolk County Jail later that day, he made further complaints of pain from beating by police. The registered nurse who examined Willette at that time found no objective eviednce of such complaints (People's Hearing Exhibit #13.)

14. I find the Defendant Willette's testimonial version of the events occurring at Homicide Squad Headquarters on the night of September 12th-13th, 1978, to be basically incredible. Contrary to the Defendant Willette's claims or contentions: (A) He was not confined and continuously interrogated in a small closed room by Det. Zito and others for a period of seven hours. (B) He did not tell Det. Zito that he wanted to contact his lawyer or exhibit a lawyer's card to Zito, nor did Zito take any such card, tear it up and tell Willette that he was his lawyer. (C) He was not struck by Zito or any other police officer at any time, nor did Det. Tosi enter the room and stomp upon his feet. (D) He was not told by Det. Rodriguez that Assistant District Attorney Sullivan was "Judge Stark's right-hand man," and that Sullivan could get him immunity by whispering into Judge Stark's ear. (E) Det. Rodriguez did not tell Willette that the written statement would protect his interests, and would guarantee that he would not spend a night in jail and that it would convince Sullivan to promise him immunity. (F) Willette did not tell Assistant District Attorney Sullivan that he had been beaten by the police. Willette did not tell Assistant District Attorney Sullivan that he wanted to contact his lawyers, Weber and Sandberg, and have them present. Assistant District Attorney Sullivan did not tell Willette that he did not need Weber because he, Sullivan, would be, in effect, his attorney. (G) Assistant District Attorney Sullivan never told or promised the Defendant Willette that he would not go to jail and would be given five years probation.

In short, none of this alleged police or prosecutorial misconduct complained of by the Defendant Willette occurred.

15. In summary, therefore, while the Defendant Willette was in the custody of the Suffolk County Police Department Homicide Squad Officers, between 9:30 p.m. on September 12, 1978, and 5:30 a.m. on September 13, 1978: (A) No police officer used or threatened the use of physical force upon him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. (C) No police officer or District Attorney made any promise or statement of fact to Willette which created a substantial risk that he might falsely incriminate himself. (D) No police officer or District Attorney in any manner deprived Willette of access to counsel. The Defendant Willette's oral and written statements made on September 12, 13, 1978, were not involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Willette.

This concludes my findings of fact concerning the Defendant Willette. I will now continue with my findings of fact concerning the Defendant Kolb.

16. On the evening of September 13, 1978, Suffolk County Police Department Homicide Officers were engaged in a surveillance of the residence of the Defendant Kolb at Adirondack Drive in Farmingville. Gribbins, who was again fitted with a hidden radio transmitter, engaged Kolb in a conversation, but was unable to induce Kolb to leave the house.

At 11:30 p.m., the surveilling police went directly to the house, and the Defendant Kolb was taken into custody by

Det./Sgt. Misegades and Det. Tosi. Kolb was driven to Homicide Headquarters in Yaphank by Det. Tosi. No interrogation took place during this trip, but Kolb kept insisting to the police officers that he was crazy.

17. Upon Defendant Kolb's arrival at Headquarters shortly before midnight, he was placed in the lieutenant's office in the custody of Det. Tosi. Det. Warkenthien entered the room and prior to any interrogation, advised Kolb of his Miranda Rights, reading same from his Suffolk County Police Department Rules of Interrogation card (People's Hearing Exhibit #3.) Such advice included his right to remain silent, that anything he did say can and will be used against him in court, his right to talk to a lawyer right now and have him present during the interrogation and his right to an appointed attorney if indigent.

The Defendant Kolb stated that he understood each of these rights and that he did not need a lawyer. He said he would tell the police anything they wanted to know in that he was crazy anyway.

18. Det. Warkenthien, with Det. Tosi present, then told the Defendant Kolb what they had already learned as to his participation in the crimes and proceeded to interrogate him.

In response to such interrogation, the Defendant Kolb made a lengthy narrative oral statement describing his participation in the crimes, along with his uncle, Gribbins, Willette and Wagner. Det. Warkenthien then asked Kolb if he would sign the rights card, and Kolb said he would not sign anything.

Appendix A

Dets. Warkenthien and Tosi then exhibited to Kolb several police photographs of the Henderson house in Blue Point, one exterior and one interior (People's Hearing Exhibits #4 and 5.) When shown these photographs, the Defendant Kolb pointed to various aspects of them and described how they had entered the house and acknowledged the accuracy of the photographs. When asked, the Defendant Kolb refused to place his initials on the photographs.

The interrogation of the Defendant Kolb was completed at approximately 2:00 a.m. on September 14, 1978.

19. At the time of his interrogation between midnight and 2:00 a.m. on September 14, 1978, the Defendant Kolb was mentally capable of understanding his rights and making a voluntary waiver of his right to remain silent and his right of access to counsel.

When the Defendant Kolb was admitted to the Suffolk County Jail later in the day of September 14, 1978, he made no complaints as to having been beaten by police (People's Hearing Exhibit #15.) However four days later, on September 18, 1978, the Defendant told jail personnel that he was a victim of police brutality and that an officer had kicked him. At that time it was noted that the Defendant Kolb had a small bruise on the inside of his right upper thigh.

20. In summary, therefore, while the Defendant Kolb was in custody of Suffolk County Police Department Homicide Squad Officers between 11:30 p.m. on September 13, 1978 and 2:00 a.m. on September 14, 1978, (A) No police officer used or threatened the use of physical force upon

him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. The Defendant Kolb's oral statements made on the early morning hours of September 14, 1978, to Dets. Warkenthien and Tosi, were not involuntarily made within the mtaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Kolb.

This concludes my findings of fact concerning the Defendant Kolb. I will now continue with my findings of fact concerning the Defendant Wagner.

21. At approximately 4:00 a.m. on September 14, 1978, various Suffolk County Police Department Homicide Squad Detectives were surveilling the home of the Defendant Wagner in Rocky Point. At this time, the Defendant Wagner came out of his house and started to drive away in a car. The vehicle was stopped by the police, and the Defendant Wagner was taken into custody by Det./Sgt. Misegades and Det. Zito and placed in a police vehicle. At this time Wagner was orally advised of his Miranda Rights by Det. Zito, and the Defendant Wagner responded that he knew his rights.

During the trip to Yaphank there was no interrogation of the Defendant Wagner. Upon arrival at Headquarters in Yaphank, Wagner was taken to a separate room in the Auto Squad section of the building.

22. Det. Zito then conducted the interrogation in the presence of Dets. Tosi and Schwalback. Det. Zito first read

the Miranda Rights to the Defendant Wagner, using his Suffolk County Police Department Rules of Interrogation card (People's Hearing Exhibit #11) Such advice included his right to remain silent, that anything he did say can and will be used against him in court, his right to talk to a lawyer right now and have him present during interrogation, and his right to an appointed attorney if indigent. Wagner responded that he knew all of this already; that he understood his rights and did not want a lawyer and was willing to talk to the police.

23. Det. Zito then interrogated the Defendant Wagner as to his participation in the Henderson crimes. Wagner became very emotional as he was questioned. He was told by Zito that Gribbins, Willette and Kolb had already implicated him, and at this point the Defendant Wagner agreed to give a statement.

Det. Zito then took a yellow pad and as the Defendant Wagner made his oral statement, Zito wrote down his responses and incorporated them into a narrative written statement (People's Hearing Exhibit #10.)

In this statement, the Defendant Wagner admitted his own participation in the crimes and described the participation of Gribbins, Kolb and Willette.

The taking of the written statement encompassed a period of approximately two hours and was completed at approximately 6:00 a.m. The Defendant Wagner then read the entire written statement, initialled the rights portion and various corrections, and signed his name at the bottom of each of the six pages. Det. Zito signed as witness, and Det. Tosi signed as Notary.

At this point, Defendant Wagner also initialled Det. Zito's Miranda Rights card (People's Hearing Exhibit #11.)

24. The Defendant Wagner was then taken by Det. Tosi to the secretary's area of the Homicide Squad for processing. In the presence of Det. Warkenthien, at approximately 7:00 a.m., Wagner was shown four police photographs of the interior of the Henderson house, which he identified and initialled each on the rear side (People's Hearing Exhibits #6, 7, 8 and 9.)

25. When the Defendant Wagner was admitted to the Suffolk County Jail later in the day of September 14, 1978, he made no complaints as to having been beaten by the police (People's Hearing Exhibit #14.) However, on the following day, September 15, 1978, the Defendant Wagner complained to jail personnel that the police had beaten him by punching him in the face and ribs at Yaphank. His physical examination made, after this complaint, did not disclose any objective pathology of any such claimed injuries.

26. In summary, therefore, while the Defendant Wagner was in custody of Suffolk County Police Department Homicide Squad Officers, between 4:00 a.m. and 7:00 a.m., on September 14, 1978, (A) No police officer used or threatened the use of physical force upon him. (B) No police officer engaged in any improper conduct or exerted any undue pressure upon him so as to impair his physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement. The

Appendix A

Defendant Wagner's oral and written statements made on the early morning hours of September 14, 1978 were not involuntarily made within the meaning of Section 60.45 of the Criminal Procedure Law. Such statements were voluntarily made by the Defendant Wagner.

Based upon all of the above facts found, I do hereby conclude, as matters of law, as follows: First, as to the Defendant Willette:

1. The Defendant Willette was taken into custody at the Modell Shopping Center on the evening of September 12, 1978, lawfully. At such time the police had lawful authority to hold and interrogate the Defendant Willette as to the Henderson crimes.

As a result of their prior investigation, including the information given them by Robert Gribbins and the overheard radio transmissions of the Gribbins-Willette conversation that evening, the police had reasonable cause to believe that the Defendant Willette had participated in the commission of the crimes, and his actual arrest without a warrant for such crimes would have been lawful under the provisions of Article 140 of the Criminal Procedure Law.

2. At the time the Defendant Willette waived his right to the assistance of counsel during the night of September 12th-13th, 1978, no attorney had entered the proceedings on Defendant Willette's behalf, and the Defendant Willette's happenstance representation by Attorneys Weber and Sandberg in the unrelated Burglary/Robbery criminal action is insufficient to invoke the Hobson Rule. (People against Clar, 41 NY 2d 612) and (People against Rolston, 66 App. Div. 2d 617).

3. There was no violation of the Defendant Willette's constitutional rights as to the required pre-interrogation warnings, and waivers under the mandate of Miranda against Arizona (384 U.S. 436.)

4. There was no violation of the Defendant Willette's constitutional rights of access to counsel.

The potential testimony of Suffolk County Police Department Homicide Squad Officers and Assistant District Attorney Sullivan reciting or describing the Defendant Willette's oral and written statements, and the written statement itself, is admissible in evidence against the Defendant Willette upon the trial of this indictment.

Secondly, as to the Defendant Kolb:

1. There was no violation of the Defendant Kolb's constitutional rights as to the required pre-interrogation warnings and waivers under the mandate of Miranda against Arizona (384 U.S. 436.)

2. There was no violation of the Defendant Kolb's constitutional rights of access to counsel.

3. The potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing Defendant Kolb's oral statements is admissible in evidence against the Defendant Kolb upon the trial of this indictment.

Thirdly, as to the Defendant Wagner:

1. There was no violation of the Defendant Wagner's constitutional rights as to the required pre-interrogation

warnings and waivers under the mandate of Miranda against Arizona (384 U.S. 436).

2. There was no violation of the Defendant Wagner's constitutional rights of access to counsel, and

3. The potential testimony of Suffolk County Police Department Homicide Squad Officers reciting or describing the Defendant Wagner's oral and written statements, and the written statement itself, is admissible in evidence against the Defendant Wagner upon the trial of this indictment.

Accordingly, the motions of each respective defendant, to suppress such evidence, is denied.

The District Attorney is directed to prepare and submit a written Order based upon this oral decision.

All right. Each of the defendants have an exception to my denial of the motion.

Now, I am prepared as to additional decisions as to other undetermined motions relating to the two of the defendants.

The Defendant Willette has separately moved to dismiss the indictment pursuant to Section 210.40 and Section 210.20 Subdivision 1, of the Criminal Procedure Law in furtherance of justice. The grounds of this motion are threefold:

1. That the defendant has been prejudiced by the three-and-a-half-year interval between the date of the commission of the crimes and the commencement of the criminal action.

2. That promises were made to the defendant by the District Attorney that he "would be granted probation and

would never spend a night in jail," if he cooperated with the police, and that the People have failed to carry out such promise, and

3. That the defendant did in fact cooperate with the police in obtaining evidence against the other co-defendants, and in doing so, placed his life in jeopardy.

Prior to the Defendant Willette's present motion to dismiss, which is dated May 31, 1979, the same defendant had earlier moved to dismiss the indictment on the ground of substantial prosecutorial misconduct.

On May 17, 1979, I made an interim decision on that motion directing that a hearing take place as to the exact nature of the District Attorney's alleged promise and the alleged misconduct. Such hearing took place contemporaneously with the hearing held on Defendant Willette's motion to suppress and all of the facts relating to the Defendant Willette's complaints of injustice were fully explored during such hearing.

I, therefore incorporate in this decision all of my findings of fact made in regard to the Defendant Willette in my suppression hearing decision rendered earlier today.

Based upon all of the facts found after such hearing, there are no compelling factors, considerations or circumstances which clearly demonstrate that conviction or prosecution of the Defendant Willette upon the indictment would constitute or result in injustice. Accordingly, Defendant Willette's motion to dismiss the indictment in furtherance of justice, is denied.

Defendant Willette has an exception to my decision in that regard.

Appendix A

The Defendant Willette has also separately moved, pursuant to the provisions of Section 200.40, Subdivision 1 of the Criminal Procedure Law, to be tried separately from the other defendants, Kolb and Wagner.

In view of the grounds urged by the Defendant Willette in support of such motion, I have deferred decisions thereon until after the completion of the extensive hearing held on the three defendants' motions to suppress. During such hearing, all of the facts concerning the interrogation of each of the three defendants were fully explored, as well as the contents of their respective incriminatory statements made to the police.

I, therefore, incorporate in this decision, all of my findings of fact made in my suppression hearing decision rendered earlier today.

I've carefully compared the incriminatory statements made by each defendant. Defendant Willette's oral and written statements incriminate himself in the planning and commission of the crimes, as well as the defendants Kolb and Wagner.

Defendant Kolb's oral statement incriminates himself in the planning and commission of the crimes, as well as the Defendants Willette and Wagner.

Defendant Wagner's oral and written statements incriminate himself in the planning and commission of the crimes, as well as the Defendants Kolb and Willette.

The only difference between Willette's statements, and those of Kolb and Wagner, is that the Defendant Willette states that he remained outside in the car at the time his accomplices were inside the house committing the crimes, while the Defendants Kolb and Wagner state that the De-

fendant Willette accompanied them into the house and participated in the crimes. This difference in the statements is not a material one in view of the charge made in the indictment that all three defendants conspired together to commit the crime of Burglary and Robbery at the Henderson house.

It is well settled that where each defendant has made a full and voluntary confession, which is almost identical to the confessions of his co-defendants, that the Bruton Rule does not require a severance and separate trial. (People against McNeil, 24 NY 2d, 550) and (People against Safian and Miner, 46 NY 2d 181.)

Accordingly, the motion of the Defendant Willette for a separate trial is denied. Defendant Willette has an exception to my ruling.

Now, as to the Defendant Kolb: On June 8, 1979, the Defendant Kolb moved for a hearing in connection with his previous motion to dismiss the indictment in furtherance of justice pursuant to Section 210.40 and Section 210.20 Subdivision 1 of the Criminal Procedure Law. The original motion to dismiss was fully considered by me in the month of May, 1979, and on May 17, 1979 I rendered a written decision denying such motion.

At the time the hearing was conducted upon the Defendant Kolb's motion to suppress the evidence during the week of June 18, 1979, I afforded the Defendant Kolb's attorney full opportunity to present factual evidence which would tend to support his motion to dismiss. No such further factual evidence was presented at the hearing.

Based upon the hearing evidence, there are no compelling factors, considerations or circumstances which

clearly demonstrate that conviction or prosecution of the Defendant Kolb upon the indictment would constitute or result in injustice.

Accordingly, I adhere to my decision of May 17, 1979, and the Defendant Kolb's motion to dismiss the indictment in furtherance of justice is denied.

Defendant Kolb has an exception to my denial of his motion.

All right, gentlemen, have you been fully advised by the District Attorney as to my present engagement in another homicide trial? The trial of this indictment must permit me to keep subject to the present trial.

Have you all been advised?

Mr. O'Leary: Yes, your Honor.

Mr. Vuturo: Yes, your Honor.

Mr. Thompson: Yes, your Honor.

The Court: How long do you contemplate that the People will be engaged in the Grant Homicide trial, Mr. Spota?

Mr. Spota: I think that from my conversation with Mr. Folks, that he anticipates the hearings to conclude probably tomorrow and it would take approximately another two weeks to two and a half weeks to complete the trial.

The Court: All right. So this, the trial of this indictment against Kolb, Wagner and Willette could not commence earlier than the week of the 24th of September?

Mr. Spota : I think that that would be a reasonable estimate; yes.

The Court: All right. What I am going to do is mark the trial of this indictment to be ready subject to the com-

pletion of the Grant Homicide trial, and for control purposes, the matter will again appear on my calendar on Monday, September 24th. I would urge all of you to keep in touch with the District Attorney as to the status of the Grant trial. If any should occur which would terminate that trial at an earlier date, I then would direct this trial to proceed immediately.

Mr. Vuturo: Are we getting a written copy of the decision?

The Court: No. If you wish to order one from the steno, you can order it. You can obtain that at the county expense.

Mr. Vuturo: All right.

The Court: All right. You will appear before me, gentlemen, on Monday, the 24th of September.

* * *

CERTIFICATION is given hereby that the foregoing is a true, correct and complete transcript of the stenographic minutes taken herein by me on the 5th day of September, 1979.

/s/ VINCENT J. RESTIVO

Vincent J. Restivo,
Official Court Reporter.

APPENDIX B

Appellate Division Opinion and Order

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 22, 1982

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. VITO J. TITONE,)
HON. WILLIAM C. THOMPSON,) *Associate Justices*
HON. LAWRENCE J. BRACKEN.)

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

ROBERT WILLETTE,
Appellant.

In the above entitled action, the above named Robert Willette, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Suffolk County, rendered November 23, 1979, convicting him of manslaughter in the first degree (to cover indictment numbers 2224/78 and 1313/78), upon his plea of guilty, and imposing sentence; said appeal brings up for review the denial, after a hearing, of defendant's motion to suppress his statements to the police and to an Assistant District Attorney; and the said appeal having been argued by Louise Perrotta, Esq., of counsel for the appellant, and

Appendix B

argued by Vincent A. Malito, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

Ordered that the judgment appealed from is hereby unanimously reversed, on the law, defendant's motion is hereby granted, the plea is hereby vacated, and the case is hereby remitted to the Supreme Court, Suffolk County, for further proceeding on indictment numbers 1313/78 and 2224/78.

Enter:

Irving N. Selkin
Clerk of the Appellate Division

Appendix B

E/ta

VINCENT D. DAMIANI, J.P.
VITO J. TITONE
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN, JJ.

——AD2d——

A—January 12, 1982

3236E

THE PEOPLE, ETC.,

respondent,

v.

ROBERT WILLETTE,

appellant.

(Ind. No. 2224/78)

John F. Middlemiss, Jr., Stony Brook, N.Y. (Louise Perrotta of counsel), for appellant.

Patrick Henry, District Attorney, Riverhead, N.Y. (Vincent A. Malito of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Suffolk County (STARK, J.), rendered November 23, 1979, convicting him of manslaughter in the first degree (to cover indictment numbers 2224/78 and 1313/78), upon his plea of guilty, and imposing sentence. The judgment brings up for review the denial, after a hearing, of defendant's motion to suppress his statements to the police and to an Assistant District Attorney.

Judgment reversed, on the law, defendant's motion is granted, the plea is vacated, and the case is remitted to the Supreme Court, Suffolk County, for further proceedings on indictent numbers 1313/78 and 2224/78.

When the police arrested defendant for the crimes charged in indictment number 2224/78, they knew that he was represented by an attorney with respect to indictment number 1313/78. Accordingly, the statements which they elicited from defendant, and the statements subsequently elicited by an Assistant District Attorney, must be suppressed (see *People* v *Rogers*, 48 NY2d 167).

DAMIANI, J.P., TITONE, THOMPSON and BRACKEN, JJ., concur.

March 22, 1982 PEOPLE v WILLETTE, ROBERT 3236E

APPENDIX C

Certificate Denying Leave

STATE OF NEW YORK
COURT OF APPEALS

Before:
HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Appellant

against

ROBERT D. WILLETTE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
May 27, 1982

/s/ SOL WACHTLER
Associate Judge

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* Description of Order: Judgment of Supreme Court, Suffolk, November 23, 1979; reversed, plea vacated and case remitted to Supreme Court, Suffolk, for further proceedings by Appellate Division, Second Department, March 22, 1982.